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In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON, and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court of Connecticut

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AARP, HISPANIC ALLIANCE OF ATLANTIC COUNTY, INC., CITIZENS IN ACTION, CRAMER HILL RESIDENT ASSOCIATION, INC., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The National Association for the Advancement of Colored People ("NAACP"), AARP, Hispanic Alliance of Atlantic County, Inc. ("Hispanic Alliance"), Citizens in Action ("CIA"), Cramer Hill Resident Association, Inc. ("CHRA"), and the Southern Christian Leadership Conference ("SCLC") submit this brief as *amici curiae*.[1]

The NAACP, established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

AARP is a nonpartisan, nonprofit membership organization of more than 35 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity, and purpose. Livable communities and economic security are two of the key social impact goals for AARP. AARP is deeply concerned with the preservation of home equity, the availability of affordable, safe, decent and stable housing and the elimination of discrimination in housing. In addition, AARP supports the ability of older people to receive the services they need in their homes and to age with dignity in their community. AARP is deeply committed to ensuring that its members are not forced out of their homes and communities except as a means to remove blight or for a needed traditional public

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[1] Pursuant to Supreme Court Rule 37.3, counsel for *amici curiae* state that all parties have given written consent to the filing of this brief. Copies of the consent letters are on file with the Clerk. Further, pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* also state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members or counsel, made a monetary contribution to the preparation or submission of this brief.

use and to ensuring that when such displacement must occur that older homeowners receive compensation that recognizes the unique costs of their dislocation. AARP's advocacy on behalf of its members has included representing through AARP Foundation Litigation (AFL) low income and minority individuals and community groups challenging redevelopment plans that would result in the taking of their homes. AFL is currently engaged in litigation challenging as racially discriminatory a redevelopment plan that uproots hundreds of residents, many of whom are elderly.

The Hispanic Alliance is a New Jersey corporation with offices located in Atlantic City, New Jersey. The Hispanic Alliance engages in educational, charitable and advocacy activities on behalf of and to further the interests of the Hispanic community within Atlantic County. Representing the Hispanic community of Ventnor, New Jersey, the Hispanic Alliance is challenging that city's targeting of a 26-block neighborhood with a highly concentrated Hispanic population which, if allowed to proceed, will result in the displacement of 332 households. That suit is pending before the Law Division of the Superior Court of New Jersey.[2]

CIA is an unincorporated community organization composed of residents of the Mt. Holly Gardens neighborhood of Mt. Holly Township, New Jersey. CIA is challenging a redevelopment plan adopted by Mt. Holly Township which calls for the demolition of all homes in the cohesive, racially and ethnically diverse neighborhood.[3]

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[2] *Hispanic Alliance of Atlantic County v. City of Ventnor*, Superior Court Docket No. ATL-C-136-03. Ventnor's redevelopment plan is also pending judicial review in the matter of *Richard Gober v. City of Ventnor*, sustained by the Law Division and the Appellate Division of the Superior Court of New Jersey at Docket Nos. ATL-L-3367-01 and A-2837-0T2, respectively. A petition for certification is currently pending before the New Jersey Supreme Court at Docket No. 56,525.

[3] *Citizens in Action, et al. v. Township of Mt. Holly*, Superior Court Docket No. BUR-L-003027-03.

CHRA is a non-profit corporation founded for the purpose of improving the quality of life in the Cramer Hill neighborhood in Camden, New Jersey, uniting and involving residents in community activities and decision-making, engaging in neighborhood planning and revitalization, and defending the Cramer Hill community against unjust use of eminent domain, and forced displacement of Cramer Hill residents. The membership of the Association is comprised of residents of the Cramer Hill neighborhood. The CHRA is currently challenging a redevelopment plan adopted by city and state officials which, if implemented, would require displacement of more than 1,000 households living in Cramer Hill by eminent domain.[4]

The Southern Christian Leadership Conference ("SCLC") is a non-profit civil rights organization founded in 1957 by Dr. Martin Luther King, Jr. and other civil rights ministers with the stated purpose of redeeming the soul of America by furthering Christian values and upholding the rights of the poor. SCLC has 90 chapters and 50,000 members across the country.

SUMMARY OF ARGUMENT

The Connecticut Supreme Court has interpreted the Fifth Amendment's requirement that any taking be for a "public use" in a way that renders those very words meaningless. Its holding that government may take property from a private citizen for the purpose of giving it to another private party purely for "economic development" is both inconsistent with the language of the Constitution and dangerous. Elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged. These groups are not just affected more often by the exercise of eminent domain power, but they are affected differently and more profoundly.

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[4] *Cramer Hill Residents' Association v. Melvin R. "Randy" Primas*, Superior Court Docket No. ___ (not yet assigned).

Expansion of eminent domain to allow the government or its designated delegate to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. This will place the burden of economic development on those least able to bear it, exacting economic, psychic, political and social costs.

The Constitution requires that any taking pursuant to the state's eminent domain power be for a "public use." Although this Court has not had cause to delineate the limits of permissible "public uses," state court decisions addressing similar provisions of state constitutions have held that something more than the mere possibility of future economic benefits is necessary to justify the exercise of eminent domain power.

Expanding eminent domain such that a stated desire for "economic development" alone satisfies the public use requirement would grant government a power that is not merely different in scope but different in kind from traditional eminent domain authority. It would remove what few checks there are on that power, virtually eliminate judicial review and fail to protect the rights of already disadvantaged groups from majoritarian pressures.

ARGUMENT

I. The Fifth Amendment Specifically Requires That Any Taking Be for a Public Use.

The power of the state to compel the sale of individual property, while long recognized and necessary under certain circumstances, is among the greatest intrusions permitted by our Constitution. It often requires individuals or families to give up their most valuable and important possessions – their homes – and even to leave lifelong communities.

The Framers created a government of limited powers, with the essential purpose of protecting private property

as well as persons.[5] The right to own and use private property is both fundamental to liberty[6] and a tangible expression thereof.[7] This Court has recognized the central and fundamental role of such rights in our system of ordered liberty.[8]

Because the eminent domain power does such violence to this fundamental right, the Fifth Amendment to the United States Constitution allows such a taking only where it is demonstrated that taking is for a "public use."[9] The public use requirement is the only true limit on the eminent domain authority.[10] Thus, the breadth or narrowness of the definition of "public use" dictates the permissible scope of the eminent domain power.

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[5] "[G]overnment is instituted no less for the protection of property than of the persons of individuals." THE FEDERALIST NO. 54, at 370 (Jacob E. Cooke ed., 1961) (James Madison); *see also* James Madison, Property, National Gazette (Mar. 27, 1792), *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland, et al. eds., 1983) ("Government is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.").

[6] "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." Arthur Lee, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA (4th Ed., New York 1775).

[7] "Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993).

[8] "The right to enjoy property without unlawful deprivation . . . is, in truth a 'personal' right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

[9] "Nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

[10] The only other requirement, that the private party from whom property is taken be given "just compensation," may limit the attractiveness of certain takings, but does not determine whether a taking is permissible.

In this case, "public use" has been defined so broadly that eminent domain authority has no practical limits. The Connecticut Supreme Court held that the use of eminent domain to transfer property from one private party to another purely because the transfer is likely to lead to greater "economic development" satisfies the public use requirement. *Kelo v. City of New London*, 843 A.2d 500, 509 (Conn. 2004). To hold that the public use requirement is satisfied wherever there are potential economic benefits to be realized is to render the public use requirement meaningless.[11] Allowing a taking simply because the party to whom the state wishes to transfer the property has a greater ability to maximize the value of that property fails to account for the rights of the individual property owners and would systematically sanction transfers from those with less resources at their disposal to those with more.

Moreover, expanding the scope of "public use" to include "potential for economic development that may ultimately benefit the public" would arguably include virtually any use and thus render meaningless the judicial review of takings cases. Such a rule would leave this important fundamental right subject to the unrestrained will of the majority.[12] Absence of judicial protection from

[11] Not only does such a reading fail to protect vital rights, it also is contrary to the venerated canon of construction that provisions are interpreted in a fashion that gives meaning to all terms. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77 (1946); *Wright v. United States*, 302 U.S. 583, 588 (1938).

[12] As Justice Story explained, "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829); *see also Calder v. Bull*, 3 U.S. 386, 388 (1798) (There "are acts which the Federal, or State Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments which will determine and overrule an apparent and flagrant abuse of legislative power" such as "a law that takes property from A and gives it to B: it is against all

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majoritarian impulses is especially troubling to *amici*, who represent the interests of groups that are targets of the overuse and abuse of the power in question.

II. The Burden of Eminent Domain Has and Will Continue to Fall Disproportionately upon Racial and Ethnic Minorities, the Elderly, and the Economically Disadvantaged.

Absent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly. These groups have been targeted for the use and abuse of the eminent domain power in the past and there is evidence that, if use of the eminent domain power for pure "economic development" is permitted, these groups will be both disproportionately and specially harmed by the exercise of that expanded power.

A. Eminent Domain Power Has Historically Been Used to Target Racial and Ethnic Minorities.

The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that "urban renewal" was often referred to as "Negro removal." 12 THOMPSON ON REAL PROPERTY 194, 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin); *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice.").

reason and justice, for a people to entrust a Legislature with such powers.").

One commentator has described how "a governing apparatus operating through housing and the highway machine implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations." Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31, 53 (2002). Ninety percent of the 10,000 families displaced by such projects in Baltimore were African-American. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 29 (1989). Los Angeles eviscerated a Mexican neighborhood with freeway projects. *Id.* Another scholar has estimated that 1,600 African-American neighborhoods were destroyed by similar projects. MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT 17 (2004).

This was no accident or oversight. The former Attorney General of Minnesota recounted his work on a Minneapolis highway project in the 1950s:

> We went through the black section between Minneapolis and St. Paul about four blocks wide and we took out the home of every black man in that city. And woman and child. In both those cities, practically. It ain't there anymore, is it? Nice neat black neighborhood, you know, with their churches and all and we gave them about $6,000 a house and turned them loose on society.

FRIEDEN & SAGALYN, DOWNTOWN, INC. at 28-29.

This phenomenon does not exist exclusively in the past. *See, e.g.*, Charles Toutant, *Alleging Race-Based Condemnation*, NEW JERSEY LAW JOURNAL, Aug. 2, 2004 (discussing litigation alleging that cities and towns target minority areas in an attempt to force them from the community in favor of those the local government considers more desirable); Erik Schwartz, *Progress or Discrimination? Facing Displacement, Minorities Battle Towns' Eminent Domain*, COURIER-POST, July 30, 2004.

B. Even Absent Abuse, Takings for "Economic Development" Will Disproportionately Affect Neighborhoods with Relatively High Concentrations of Racial and Ethnic Minorities and the Elderly.

Even absent illicit motives, eminent domain power has affected and will disproportionately affect racial and ethnic minorities, the elderly and the economically disadvantaged. Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private enterprises could construct superstores, casinos, hotels and office parks. *See* DANA BERLINER, *Condemnations for Private Parties Destroy Black Neighborhoods and Out with the Old: Elderly Residents are Prime Targets for Eminent Domain Abuses in* PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 102, 185 (April 2003).

For example, four siblings in their seventies and eighties were forced to leave their homes and Christmas tree farm to enable the city of Bristol, Connecticut to erect an industrial park. *Bugryn v. City of Bristol*, 774 A.2d 1042 (Conn. App. Ct. 2001), *appeal denied*, 776 A.2d 1143 (Conn. 2001), *cert. denied*, 534 U.S. 1019, 122 S. Ct. 544 (2001).[13] Several African-American families in Canton, Mississippi were similarly forced to leave the homes they had lived in for over sixty years to clear land for a Nissan automobile plant. *See* David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20.[14]

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[13] In permitting the taking, the court observed that "the state had recognized the city as an economically disadvantaged community and that the industrial park would serve the public good by creating or retaining manufacturing jobs, creating additional industrial land in the city and increasing the tax base." *Id.* at 1049. Neither the legislature nor the court made any finding of blight.

[14] Again, the taking was not justified on the basis of blight or necessity. As the executive director of the Mississippi Development Authority explained:

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Statistics confirm that takings for economic development disproportionately impact these groups. In San Jose, California, ninety-five percent of the properties targeted for economic redevelopment are Hispanic or Asian-owned, even though only thirty percent of businesses are owned by minorities. Derek Werner, *Note: The Public Use Clause, Common Sense and Takings,* 10 B.U. PUB. INT. L.J. 335, 350 (2001) ("Between 1949 and 1963, sixty-three percent of all the families displaced by urban renewal were non-white."); *Poletown Neighborhood Council v. City of Detroit,* 304 N.W. 2d 455, 464 (Mich. 1981) (City of Detroit condemned the homes of approximately 3,438 persons, most of whom were elderly, retired, Polish-American immigrants, to build a General Motors plant). *See also Who Feels Renewal Most?* SILICON VALLEY/SAN JOSE BUSINESS JOURNAL, Sept. 20, 2002, at 1. Similarly, near Atlantic City in Ventnor, New Jersey, forty percent of the city's Latino community lives in a zone targeted for economic redevelopment. *See* Schwartz, *supra*. In Mt. Holly Township, New Jersey, officials have targeted for economic redevelopment a neighborhood in which the percentage of African-American residents (44%) is twice that of the entire Township and nearly triple that of Burlington County, and in which the percentage of Hispanic residents (22%) is more than double that of all of Mt. Holly Township, and more than five times that of the county. *Id.*; U.S. Census of Population and Housing, 2000: Tables for Blocks 1000, 1001, 1003 and 1009: (a) Vacancy Status, (b) Tenure by

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> It's not that Nissan is going to leave if we don't get that land. What's important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through.

Id. The trial court nonetheless ruled in favor of the taking. *Mississippi Major Impact Authority v. Archie*, No. Co-2001-0082 (Madison Cty., Miss. Spec. Ct. July 26, 2001). Upon motion of the families, the Supreme Court of Mississippi stayed the condemnations until it could consider the families' appeal. Once the stay was granted the state gave up its fight and dismissed its eminent domain actions.

Race of Householder, and (3) Tenure by Household Size (Hispanic or Latino Householder): Mt. Holly, New Jersey.[15] These statistics confirm that if eminent domain can be exercised for the purported public use of "economic development," the displacement of the poor, minorities and the elderly will only become more commonplace.[16]

The reason these groups are disproportionately affected is that they are palatable political and economic targets. Condemnations in predominately minority or elderly neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action. *See* Laura Mansnerus, *Note: Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U.L. REV. 409, 435-436 (1983) (discussing the difficulty of opposing condemnation proceedings). Condemning authorities target areas with low property values because it costs the condemning authority less (as market value is the measure of the "just compensation") and the state and/or local governments gain financially when they replace areas with low property values with those with higher values. Even assuming non-discriminatory motives, cities like New London have and will continue to target these areas. *See, e.g., Kelo,* 843 A.2d at 509 (Conn. 2004)

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[15] In both the Ventnor and Mt. Holly cases there were pretextual findings of blight, but the condemning authorities did not adhere to the applicable standards. Were "economic development" a public use and a finding of blight unnecessary, it would be substantially more difficult – if not impossible – for plaintiffs to stop such condemnations.

[16] As discussed in subsection C below, renters are, in some senses, placed in an even more difficult position than homeowners when their residence is taken by eminent domain. In New London, a disproportionate percentage of renters come from minority groups. New London is a racially and ethnically diverse community: 56.1% of its residents are white, 19.7% are Hispanic and 18.6% are African-American. U.S. Census of Population and Housing, 2000: Summary Population and Housing Characteristics: New London, Connecticut. But whereas 49.6% of New London's white population rent their homes, 70.9% of the city's African-American population and 75.7% of its Hispanic population are renters. *Id.*, Total Population in Occupied Housing Units by Tenure, 2000: New London, Connecticut.

(citing adding jobs and tax revenue as motivation for the taking); *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (same).

C. The Impact of Takings on the Elderly, Minorities and the Economically Disadvantaged is Different in Kind from Their Impact on Other Populations.

The very circumstances that put minorities and the elderly at increased risk of being subjected to eminent domain power also leave those groups less able to deal with the consequences when such takings occur. Thus, it is not simply that the exercise of eminent domain, particularly when the purpose is "economic development," affects the elderly, minorities, and the economically disadvantaged more often than it does those with more political and economic power, but that it affects those groups in different and more profound ways.

Eminent domain law does not truly offer "just compensation" in the economic development context. "Just compensation" is generally defined as the fair market value of the property at the time of the taking. *See, e.g., Tandet v. Urban Redev. Comm'n*, 426 A.2d 280, 298 (Conn. 1979). The fact that particular property is identified and designated for "economic development," however, almost certainly means that the market is currently undervaluing that property or that the property has some "trapped" value that the market is not currently recognizing. In addition, determination of just compensation is limited by the "project influence doctrine," which prevents the court's consideration of the likely change in market value as a result of the actual project for which the property is being condemned. *See, e.g., City of San Diego v. Rancho Penasquitos P'shp*, 130 Cal. Rptr. 2d 108, 119 (Cal. App. 2003); *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555, 560-61 & n.6 (Mo. App. 1983) (collecting cases). Thus, those displaced by eminent domain exercised for the purpose of "economic development" are systematically undercompensated.

Moreover, when an area is taken for "economic development," the underprivileged, racial and ethnic minorities, and the elderly are driven out of their own neighborhoods, unable to afford to live in the "revitalized" community.[17] Because the neighborhoods chosen are (in large part) selected because of the low market value of the properties therein, these displaced individuals will typically have a difficult time finding adequate replacement housing.

This phenomenon is clearly present in the case at hand. As of the most recent census, the median residential property value for owner-occupied residences in the City of New London is $107,900, whereas the value for such properties in the county is $142,200 and $166,000 statewide.[18] Moreover, in such economically disadvantaged areas, a disproportionately large percentage of the residents are renters rather than owners. New London is no exception,[19] and those renters may have an even more difficult time finding adequate replacement housing than do those who own their home.[20]

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[17] *See generally* Pritchett, *supra* p. 7; John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two:" Gentrification and The K.O. of Impoverished Urban Dwellers of Color*, 46 How. L.J. 433 (2003).

[18] U.S. Census of Population and Housing, 2000: Median Value of Specified Owner-Occupied Housing Units: Connecticut.

[19] Over 62% of New London residents rent their homes as compared to the state-wide average of 33.2%. U.S. Census of Population and Housing 2000: General Housing Characteristics: Connecticut.

[20] Many of New London's renters struggle to pay their rent. As of the most recent Census, New London's per capita yearly income was $18,437. U.S. Census of Population and Housing, 2000: Connecticut. According to the U.S. Department of Housing and Urban Development (HUD), a household in New London earning $19,620 per year in 2003 could afford a maximum monthly rent of $491, whereas the Fair Market Rent (FMR) in New London for a one-bedroom household is $654 per month, and a two-bedroom household is $797 per month. 68 Fed. Reg. 56713 (October 1, 2003). State-wide, the FMR for a one-bedroom household is $752 per month, and a two-bedroom household is $936. *Id.*

Not only are other areas less likely to be affordable than that from which victims of eminent domain power for "economic development" are displaced, but the remaining "affordable" housing in the area is almost certain to become less so. Such takings invariably take lower cost housing and replace it with either business(es) or higher cost housing in order to achieve the goal of increasing the tax base and/or number of jobs. This reduces the supply of affordable housing in the area and drives up prices. Indeed, one study indicates that 86 percent of those relocated by an exercise of the eminent domain power were paying more rent at their new residences, with the median rent almost doubling. HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 380 (2d ed. 1982); *see also* SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3 (1965) (citing multiple studies and concluding that "[a]ll ten . . . indicate substantial increases in housing costs").

Displacement presents a particular burden for the elderly. Over one-third of New London's homeowners are aged 65 or older. Overwhelmingly, the elderly strongly prefer independent living in their own homes to other alternatives. Not only is remaining in one's own home the vast preference of older people, *see, e.g.*, HOUSING ASSISTANCE COUNCIL, FEDERAL PROGRAMS AND LOCAL ORGANIZATIONS: MEETING THE HOUSING NEEDS OF RURAL SENIORS (2001), home ownership is associated with a reduced risk of entering a nursing home, as well as a greater likelihood of exiting if admitted. Vernon L. Greene and Jan I. Ondrich, *Risk Factors for Nursing Home Admissions and Exits: A Discrete-Time Hazard Function Approach* 45 J. GERONTOL. SOC. SCI. S250-S257 (1990). The risk of not being able to afford adequate replacement housing is particularly acute as New London residents aged 65 or over earn significantly less income per year than working

adults and 11.4% of the city's elderly population live below the poverty line.[21]

In addition to the increased risk of institutionalization, there is the considerable psychic harm that affects those dislocated from their homes and communities, particularly among the elderly. For example, one of the plaintiffs in this action, Wilhelmina Dery would, under the New London development plan, be removed from a home she was born in over 85 years ago and a community which her family settled upon their arrival from Italy in the early 1880s. Trial Tr., Vol. 1, 40-53 (July 23, 2001). Her husband has lived in their house with her for the past 59 years and their son and his family have lived in the house next door since he married. *Id.* The deleterious psychological effects of such upheaval have been studied and recorded. *See, e.g.*, FULLILOVE, ROOT SHOCK at 11-20; FRIEDEN & SAGALYN, DOWNTOWN, INC. at 34; GANS, THE URBAN VILLAGERS at 379. Indeed, studies have found tangible effects from such dislocation including increased risk from stress related diseases, such as depression and heart attack. FULLILOVE, ROOT SHOCK at 14.

Like the elderly, racial and ethnic minorities will suffer special harm from takings for the purpose of "economic development." To the extent that such exercise of the takings power is more likely to occur in areas with significant racial and ethnic minority populations, and even assuming a proper motive on the part of the government, the effect will likely be to upset organized minority communities. This dispersion both eliminates (or severely undermines) established community support mechanisms and has a deleterious effect on those groups' ability to exercise what little political power they may have established as a community.[22]

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[21] U.S. Census of Population and Housing, 2000: Connecticut.

[22] The very threat of such takings will also hinder the development and improvement of strong minority communities. Enforcement of the constitutional limits on eminent domain power embodied in the Fifth

(Continued on following page)

III. While This Court Has Permitted Use of the Eminent Domain Power to Remedy Blight, It Has Never Endorsed Taking Purely for Economic Development.

Permitting exercise of eminent domain power to transfer property from one private party to another for its anticipated "economic development" both fails to protect a fundamental individual right from majoritarian impulses, and places the burden of economic development most heavily upon those who are least able to bear it. Such a result is unjust and is in no way compelled by this Court's jurisprudence.

The Connecticut Supreme Court's conclusion that pure economic development constitutes a valid public use under the federal constitution relies primarily on a misreading of this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). In *Berman*, the District of Columbia Redevelopment Land Agency acquired a stretch of land by eminent domain "for the redevelopment of blighted territory in the District of Columbia and the prevention, reduction or elimination of blighting factors or causes of blight." 348 U.S. at 29 (citation omitted). A department store in the blighted area challenged the taking. The Supreme Court allowed it, finding that blight could reasonably be addressed "on an area rather than on a structure-by-structure basis." *Id.* at 34. *Berman* found the District of Columbia Redevelopment Act constitutional, *as*

Amendment "protects private expectations to ensure private investment." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). The incentive to invest in one's community, financially and otherwise, directly correlates with confidence in one's ability to realize the fruits of such efforts. By broadening the permissible uses of eminent domain in a way that is not limited by specific criteria many minority neighborhoods will be at increased risk of having their property taken. Individuals in those areas will thus have less incentive to engage in community-building for fear that such efforts will be wasted.

applied. It did not address the Act's facial constitutionality.[23]

As applied, the redevelopment in *Berman* was fundamentally different than the activity in New London. The redevelopment was the *means* to solve the urban problem of blight, not the *purpose* or *end* of the exercise of eminent domain. In *Berman*, the purpose of the exercise of eminent domain was to eliminate slums and urban blight:

> In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community. . . . It was important to redesign the whole area so as to eliminate the conditions that cause slums. . . . In this way ***it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented***.

Id. at 34-35 (emphasis supplied). The motivation for the takings in New London are entirely different:

> In its preface to the development plan, the development corporation stated that ***its goals were to*** create a development that would complement the facility that Pfizer was planning to build, ***create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront***, and eventually "build momentum" for the revitalization of the rest of the city, including its downtown area.

Kelo, 843 A.2d at 509 (Conn. 2004) (emphasis supplied). This difference is crucial because in *Berman*, the Court evaluated the propriety of the eminent domain *for the purpose of eliminating blight*. It *then* asked whether redevelopment was an acceptable use for the land. In the case at bar, the question is whether economic improvement *itself* is a valid reason for exercise of eminent domain power.

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[23] "The challenge was to the constitutionality of the Act, particularly as applied to the taking of appellants' property." *Berman*, 348 U.S. at 28.

Hence, *Berman* stands only for the proposition that, once the *purpose* behind the eminent domain has been deemed a "public use," the transfer of the land to private parties for economic development may be appropriate. "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Berman*, 348 U.S. at 33. It does not hold that economic development alone is a proper public use.

The assault on private property rights occurs at the taking, not upon the redeveloping of the property. The focus of eminent domain analysis thus must remain on the end accomplished by taking the property rather than how the property is to be used after the taking.

The Connecticut Supreme Court's reliance on *Hawaii v. Midkiff* is similarly misplaced. That case contained two peculiar circumstances. First, it dealt with rectifying historical inequities enforced by the state legislature in the 1960s, a concern not present in this case. Second, it contemplated the public value of land redistribution to the less wealthy. The public value of such purposeful land redistribution is a fundamentally different public question than the economic development in question here. The unique facts of *Midkiff* render its holding inapplicable to the present controversy.

As explained above, these *amici* oppose the extension of the eminent domain jurisprudence to cases of pure economic development because the eminent domain power has traditionally been used (and abused) to the detriment of those with less economic and political power, particularly minority racial and ethnic groups, the economically disadvantaged and the elderly. It would be cruelly ironic if permitting a single taking to rectify historical inequities under the unique circumstances present in *Midkiff* was used to justify expansion of eminent domain power in such a way that will have a disproportionate negative impact on other historically discriminated-against and disadvantaged groups.

IV. Some States Have Recognized That Economic Development Alone Cannot Constitute a Public Use.

Unlike this Court, several state courts have been squarely faced with the issue of whether economic development alone constitutes a public use. One of the seminal cases relied upon by the Connecticut courts is the Michigan case *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 2d 455 (Mich. 1981). That case, however, was recently overruled, *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004), and the experience of Michigan should counsel this Court against repeating the mistake of *Poletown*.[24]

In *Poletown*, the Michigan Supreme Court permitted the city of Detroit, at the time financially strapped and desperate for economic recovery, to condemn private property in a neighborhood of Polish immigrants (called Poletown) in order to transfer the property to General Motors for the building of an assembly plant. 304 N.W. 2d at 457-58. Poletown had not been found to be blighted, nor was it necessary for GM to locate in that particular neighborhood. Rather, GM approached the city about using its eminent domain power to acquire parcels to GM's specifications, to which the city readily agreed in hopes of creating jobs and increasing the tax base. *Id.* at 466-67. The Michigan Supreme Court equated "public use" with "public purpose," and found this sort of "economic development" to be a public use or purpose, even though there was no blight to be cleared. *Id.* at 457.

Justice Ryan wrote a vigorous and insightful dissent in which he explained how the majority's holding was

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[24] Although *Hathcock* concerned the interpretation of the public use requirement of the Michigan Constitution, the language of the relevant clause is almost identical to that in the Federal Constitution. *Compare* Mich. Const. Art. X, § 2 ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.") *with* U.S. Const. Amend. 5 (quoted *supra* note 9).

inconsistent with Michigan's prior caselaw. He further pointed out that eminent domain "can entail, as it did in this case, intangible losses, such as severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Id.* at 481.

Justice Ryan went on to describe precisely the scenario that troubles *amici* in this case when eminent domain is used for the purpose of "economic development" like in *Poletown* and in *Kelo*:

> What has been done in this case can be explained by the overwhelming sense of inevitability that has attended this litigation from the beginning. . . . The justification for it, like the inevitability of it, has been made to seem more acceptable by the "team spirit" chorus of approval of the project which has been supplied by the voices of labor, business, industry, government, finance, and even the news media. Virtually the only discordant sounds of dissent have come from the miniscule minority of citizens most profoundly affected by this case, the Poletown residents whose neighborhood has been destroyed.

Id. at 81-82.

The Michigan Supreme Court recently had cause to reconsider *Poletown*, and determined that the decision's expansive definition of "public use" was inconsistent with Michigan's caselaw and its constitution.[25] At issue in

[25] It is also worth noting that the *Poletown* development fell well short of expectations in terms of economic impact. After the city of Detroit spent over $200 million acquiring and preparing a site for General Motors (in the process displacing 600 businesses and demolishing 1400 residential structures), it took GM two years longer than scheduled to finally open its plant (seven years after the condemnations) and the plant only employed a little more than half of the workers originally promised. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, DOLLARS & SENSE, July 2001; *cf. Poletown*, 304 N.W. 2d at 471.

Hathcock was the condemnation of land for the creation of a business and technology park. The Michigan Supreme Court agreed that the business park would help the local economy and that, if *Poletown* were to remain good law, it would have to affirm the county's determination that this was a constitutional "public use." However, the court overruled *Poletown* and adopted Justice Ryan's dissent. The court found that only three more limited situations qualified as "public use" in the context of eminent domain, observing that:

> Every business, every productive unit in society, does . . . contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

Hathcock, 684 N.W. 2d at 786.

Several other states have also explicitly rejected the slippage of public use to the point where potential "economic development" alone will satisfy the requirement. *See, e.g., Georgia Dept. of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1 (Ill. 2002); *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994); *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003); *cf. City of Midwest City v. House of Realty, Inc.*, ___ P.3d ___, Nos. 100,064, 100,065, 2004 WL 1446925 (Okla. June 29, 2004);

Eighth & Walnut Corp. v. Public Library of Cincinnati, 385 N.E.2d 1324 (Ohio 1977).

While some states other than Connecticut have accepted the use of eminent domain for purely economic development purposes,[26] many of these cases relied upon the now-overruled *Poletown* case. The fact that some states are effectively reading out the United States Constitution's public use requirement, coupled with the deleterious impact that this has on various socially and economically disadvantaged groups as described above, makes it vital that this Court hold that economic development alone does not constitute a public use for eminent domain purposes.

V. "Economic Development" Is Not Amenable to Standards Enabling Judicial Review.

Allowing "public use" to include "economic development" renders the eminent domain power open to abuse – to the particular disadvantage of those, such as *amici*, who lack economic or political power. It is a fundamental principle of our government that the judiciary functions as a check on the potential for tyranny of the majority.[27] In

[26] *See, e.g., City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004); *City of Jamestown v. Leevers Supermkts.*, 552 N.W. 2d 365, 372-73 (N.D. 1996); *Duluth v. State*, 390 N.W. 2d 757, 763 n.2 (Minn. 1986).

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> [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . . Th[e] independence of the judges is . . . requisite to guard the Constitution and the rights of individuals. . . . [T]he firmness of the judicial magistracy . . . serves to moderate the immediate mischiefs of those [laws] which may have been passed, [and] it operates as a check upon the legislative body in passing them.

THE FEDERALIST NO. 78, at 525, 527-28 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961); *see also* THE FEDERALIST NO. 47, at 326 (James Madison) (Jacob E. Cooke, ed., 1961) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control . . . .") (quoting Montesquieu).

order for the judiciary to perform this function, the laws must be subject to judicial review.[28] And in order for that judicial review to be effective, there must be standards to govern the judiciary's decisions. Unlike the "public uses" that have previously been allowed by this Court, the limits on a public use of "economic development" are not susceptible of easy definition, and thus the judiciary is unable to rein in potential abuses of the eminent power by reference to those limits.

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . ." THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961). Courts have recognized that specific and objective standards can prove a useful check on what might otherwise be unlimited government power, or in areas where the court is particularly concerned about abuse (as the history of eminent domain demonstrates the Court should be here, *see* Section II.A *supra*) which infringes on fundamental individual rights. For instance, this Court has long recognized the usefulness of standards as guideposts to check government power and guard against abuse of that power in the area of First Amendment prior restraints:

> The absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far

[28] *See* THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961) ("Laws are a dead letter without courts to expound and define their true meaning and operation.").

> too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 758 (1988). Likewise, standards in the area of eminent domain can allow courts to check whether the power is indeed being used for a permissible public purpose. Although the analysis of eminent domain cases is admittedly different from First Amendment cases, the underlying point – that specific, objective standards provide a means of checking against infringement on important constitutional rights – remains valid, and should inform the Court's approach to this case.

In *Hathcock*, the Michigan Supreme Court case overruling *Poletown*, the court retreated from the amorphous "economic development" justification for use of eminent domain and instead set out three situations in which "public use" would justify its application: (1) construction of roads and the like, which requires collective action; (2) where the property remains subject to public oversight; and (3) "where the property is selected because of 'facts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred." 684 N.W. 2d at 783. The first two situations – where its use is necessary to allow construction of roads and other instrumentalities of commerce, and where the public retains some measure of control over the use of the property – are not only reasonably limited, these traditional uses of eminent domain are also well-defined by years of precedent.

Even the third "public use," which is essentially the equivalent of what this Court in *Berman* termed "blight" and is admittedly less limited, is still reasonably susceptible of definition.[29] For instance, in *City of Midwest City v.*

[29] This is not to say that the "blight" rationale has not proven problematic in practice. *See* discussion of "Negro removal" *supra* pp. 7-8. Indeed, *Berman* itself had a distinct racial overtone that is largely

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House of Realty, Inc., Oklahoma defined blight as requiring the presence of certain specific conditions, including "a substantial number of deteriorated or deteriorating structures," or "unsanitary or unsafe conditions," under two statutes where the state's eminent domain power had been delegated to the local government, whereas in a statute that did not delegate eminent domain power, blight was defined by somewhat broader standards. 2004 WL 1446925, at *8-11 (Okla. June 29, 2004). The Oklahoma Supreme Court found it unnecessary to address the plaintiff's argument that the latter broader standards failed to provide adequate guidelines to local governments, and thereby rendered the local government's use of the eminent domain power unconstitutional, because it held that the latter statute simply did not authorize local governments to exercise eminent domain power. Other states have been able to define "blight" in similar ways. *See Hardwicke v. City of Lubbock*, ___ S.W.3d ___, No. 07-04-0097-CV, 2004 WL 2051823, at *1, 3-4 (Tex. App. Sept. 3, 2004); *Concerned Citizens of Princeton, Inc. v. Mayor & Council of the Borough of Princeton*, 851 A.2d 685 (N.J. Super. Ct. App. Div. 2004), *certification denied*, No. 56,750, ___ A. ___, 2004 WL 2713995 (N.J. Oct. 6, 2004).

By contrast, when economic improvement is the public purpose, there is *no natural limit* to government takings. "Economic development" can be as broad as any "higher" or "better" use that the local government or redevelopment agency can imagine, and can be used to justify the taking

ignored in the opinion. The "renewal district" in *Berman* was 97.5% "Negroes." 348 U.S. at 36. Of the 5,900 units of housing that were ultimately constructed on that site, only 310 could be classified as "affordable" to former residents of the area. HOWARD GILETTE, JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C. 163-64 (1995). This resulted in the area being transformed from almost entirely African-American to majority white in less than a decade. *Id.* at 164.

of virtually any property.[30] As the *Hathcock* court observed, the "'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." 684 N.W. 2d at 786 (emphasis in original).[31]

In this case, the Connecticut legislature determined that acquisition and redevelopment of private property was justified for the purpose of fostering "continued growth of industry and business within the state," because "such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost." Conn. Gen. Stat. § 8-186. In other words, the state legislature declared it "necessary" to use the extraordinary power of eminent domain to foster business simply because it believed that the market for private property was often inefficient.[32] Yet, the market may be inefficient for

[30] While the elimination of blight also impacts economically poor areas, blighted areas are (or, at least, should be) chosen because of genuine public safety and welfare problems, like structurally unsound homes or neighborhoods rife with crime. *See Berman*, 348 U.S. at 31. On the contrary, areas targeted for redevelopment are frequently well-maintained, untroubled neighborhoods – if they weren't, cities would assert the *permissible* public use of eliminating blight.

[31] *See also Chesapeake Stone Co. v. Moreland*, 104 S.W 762, 765 (Ky. 1907):

> If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

[32] The affected neighborhoods were not shown to be "blighted areas"; although New London was designated a "distressed municipality," the designation as a "distressed municipality" was not a requirement for allowing the use of eminent domain for the project, but only for obtaining special grants for the development.

good reason: Individuals develop personal connections to the places they live, and those personal connections inform their decisions whether to sell their property as much, or more than, the market value of the property. The Constitution allows the individual property owner to decide, in most cases, that his property is more valuable to him than the market dictates by placing limitations on the circumstances for which private property must be given up in exchange for "just compensation."

Even assuming that extending the meaning of "public use" to include "economic development" provides some limit on the government's eminent domain power,[33] the fact that "economic development" is not easily defined inexorably leads to one of two results, neither of which adequately protects the fundamental right of individuals to retain the property they own absent an overriding public interest. First, and at best, judicial decisions as to whether the promise of "economic development" justifies the use of eminent domain in particular cases will be inconsistent, leaving governments unsure of the extent of their power, and individuals likewise unsure of the extent of their

[33] The dissent in the Connecticut Supreme Court proposes a three-part test that purports to give objective standards by which to assess whether a particular taking for "economic development" constitutes a public use. 843 A.2d at 587-88. Because of the inherent breadth of the term "economic development," the standards proposed by the dissent will do little to inform or constrain exercise of eminent domain power. For example, one of the prongs of the test proposed by the dissent is whether the public benefit sought is likely to be achieved. *Id.* at 588. Determining *ex ante* whether a business venture is likely to be successful is a highly inexact determination and most instances either answer is nearly equally likely to be correct. Moreover, "public benefit" is not achieved merely if the project is successful from the perspective of the private developers, it requires further guesswork as to whether any such success is likely to trickle down and result in the creation of more jobs than previously existed and significant expansion of the tax base. While *amici* do not believe that "economic development" by private parties should or can constitute a public use, *see* Part I *infra*, the attempt to craft a workable standard for determining, case-by-case, if such a taking constitutes a public use is preferable to the majority position, which would result in no meaningful review at all.

property rights. Second, and more likely, the courts, unable to ascertain a clear limit on permissible "economic development," will be reluctant to interfere with a legislative decision that a given development is a "public use," eliminating the ability of the judiciary to function as a check on the legislature in precisely the setting where, as discussed in Part II, *supra*, certain historically discriminated-against groups are at a systematic disadvantage.[34]

Deference to that legislative determination in such a case is a complete license to the legislature to adjust private property rights in whatever way it sees fit, offering no protection for the rights of individual property owners from majoritarian overreaching. This potential for overuse should be checked by refusing to expand the definition of public use in the eminent domain context and limiting public uses to the three categories identified in the *Poletown* dissent and adopted in *Hathcock*. *See* 304 N.W. 2d at 476.

The lack of meaningful review and of clear standards for that review is particularly troubling in the eminent domain context, where the authority to take property is often delegated local governments. *See, e.g., Eighth & Walnut Corp.*, 385 N.E.2d at 1326. Local governments are

[34] Indeed, the courts below deferred to the legislative determination, finding that, in this case, the legislature could rationally have determined that economic development was a public use, 843 A.2d at 528, and that there was no evidence of bad faith, *id.* at 533. The Connecticut Supreme Court based its deference to the legislative determination that "economic development" was a public use on *Berman*. Specifically, the Connecticut Supreme Court quoted that portion of *Berman* that stated, "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 260 Conn. 1, 36 (quoting *Berman*, at 32). But the deference to legislative purpose discussed there assumes that there are "specific constitutional limitations" on the legislature's determination of "public use." If the Constitution's "public use" clause does not admit of a limitation narrower than the whole field of "economic development," then there is effectively no "specific constitutional limitation" on the legislature's determination of the public interest.

particularly prone to capture by private, politically influential and economically powerful interests. Pritchett, *supra* p. 7, at 2 ("Several studies have shown how urban elites promoted redevelopment to . . . protect and enhance their real estate investments")[35]

The ability of the public to obtain meaningful review and to hold the government to specific standards for use of its eminent domain power is thus particularly important to *amici*, who represent groups that are typically less politically and economically powerful. As Justice Ryan observed in *Poletown*, these groups are often the ones who bear the brunt of the effect of the condemnation, but their dissent will be unpopular when the rest of the community believes they stand in the way of "economic development." Having specific, objective and verifiable standards against which the public can measure the use of eminent domain – in the political process, and if necessary, in the courts – is an important check on the potential for abuse.

[35] In fact, the delegation of the eminent domain power does not end at local governments, who are accountable to the public in at least some minimal way. The authority is commonly delegated to utilities, redevelopment agencies and the like. *See, e.g., Concerned Citizens, United v. Kansas Power & Light*, 523 P.2d 755 (Kan. 1974) (noting that the power of eminent domain is delegated by statute to electric utility, which is "vested with reasonable discretion to determine the necessity of taking land for its lawful corporate purposes," and that discretion is subject to review only for abuse of discretion); *Burlington Northern and Santa Fe Ry. Co. v. Chaulk*, 631 N.W. 2d 131, 137 (Neb. 2001) (noting that "[a]lthough railroads are private corporations, they have been given the statutory authority to acquire land through eminent domain"); *Balsamo v. Providence Redevelopment Agency*, 124 A.2d 238 (R.I. 1956) (noting redevelopment agency was delegated authority to exercise eminent domain authority). Without standards governing the permissible uses of eminent domain authority, overuses and abuses of the authority by private or semi-private companies will be difficult to combat.

CONCLUSION

The Fifth Amendment's public use requirement is a specific textual limitation on the government's power to take privately held property. Should this Court affirm the Connecticut Supreme Court's holding that pure "economic development" constitutes a public use for eminent domain purposes, legislative majorities will be able to infringe on the property rights of minorities and allocate the burdens of economic development to less politically and economically powerful groups – those least able to bear this burden. Shorn of the textual limitation embodied in the Fifth Amendment and absent meaningful judicial review of majoritarian legislative enactments to protect this important individual right against wrongful takings, the eminent domain power becomes little more than "a license for government to coerce individuals on behalf of society's strongest interests."[38]

Respectfully submitted,

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[38] George F. Will, *Despotism in New London*, WASHINGTON POST, Sept. 19, 2004, at B7.